

## Title IX: Equality for Women's Sports?

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Since their beginnings in 1859 with a crew race between Harvard and Yale, intercollegiate athletics have been central to the mythology of American universities. Varsity football dominates the fall social calendar of student life; "homecoming," timed to coincide with an important football game, evokes alumni nostalgia. Winter is the season for varsity basketball, culminating in the National Collegiate Athletic Association (NCAA) national championship tournaments in early spring. Until quite recently, the participants in intercollegiate varsity sports were nearly all men.

The entry of women competitors into the apparently glorious haze of intercollegiate athletics has been belated and awkward. With the passage of Title IX in 1972, universities were required to provide equal opportunity in all of their federally funded programs. Most moved quickly to establish varsity sports teams for women in numbers roughly equal to their offerings for men. The near similarity in numbers of teams, however, belies important continuing differences. Football remains a major source of attention, revenue, and expenditure. Men's basketball is also a high-profile activity; women's basketball, particularly with the NCAA tournament and television exposure, recently has taken some steps towards success on the male model. In nonrevenue sports, from skiing and ice hockey to swimming and water polo, although teams are fielded in roughly equal numbers, participation and expenditure rates remain higher for men, in ratios that far exceed the proportions of men in overall enrollments.

The rosy glow of college athletics, perhaps always exaggerated, has been fading of late. Even football is a losing proposition on most campuses. Sperber (27), Thelin (29), and others report mismanagement, overexpenditure, and corruption. The National Collegiate Athletic Association, the private body that regulates intercollegiate athletics, has been criticized for behaving as an economic cartel by Fleisher, Goff, and Tollison (8), Hart-Nibbrig and Cottingham (11), and Lawrence (13), among others. Colleges are rebuked for exploiting, not educating athletes; premier athletes themselves exit early, in increasingly greater numbers, to professional opportunities. Faculties and even university presidents seek, with uneven success, to establish greater control over intercollegiate athletics. As universities confront shrinking academic budgets, athletics expenditures, often more than 5% of the institution's total, are viewed with mounting concern (30). Universities are urged to sell off their money-making sports teams as separate businesses and to abolish the remainder, leaving only intramural activities that

all can enjoy. Older and working students may view intercollegiate athletics as part of a romanticized past that never really was and may resent the dedication of large proportions of student fees to their continued support.

Given this critical picture of the current state of intercollegiate competitive sports, there is something of a paradox to women's claims for equal participation. These claims might be viewed as efforts to participate in a practice that is morally problematic on many counts—that is perhaps bad for, and most likely not beneficial for, participants; bad for their fellow students and the universities; and bad for society in general. If intercollegiate athletics in their current state are indeed an activity that universities should discourage, radically alter, or even eliminate, how should claims to equality on behalf of women be evaluated? In this paper, I take women's athletics as a problem about the morality of affirmative action within a social practice that is significantly morally flawed. I argue that within such a context, the case for affirmative action is limited but powerful, at least until there are serious social efforts to improve or eliminate the flawed social practice. I begin with an assessment of the case to be made for the current practice of intercollegiate athletic competition.

### **I. Why Intercollegiate Athletic Competition?**

Since Greek times at least, sports have been thought to be an important part of the process of education. Athletic endeavors, it has been argued, promote discipline and health. They clear the mind for other learning, it is said. For women, athletic participation may also be important in counteracting historical images of weakness and passivity. If this or a similar paean to the educational glory of sports is to be believed, then there are arguments for physical education, health, and intramural sports activities on university campuses. Arguments for the general educational importance of athletics, however, do not necessarily provide support for intercollegiate competition. Indeed, if the development of intercollegiate competition draws money and enthusiasm away from more widespread participation in sports, education and intercollegiate sports may come into conflict. The critical analysis that follows is aimed at intercollegiate sports competition of the kind found in schools offering athletic scholarships, not at the general educational value of sport or at the intramural or club programs open to the entire student body.<sup>1</sup>

Universities typically offer both intrinsic and instrumental arguments for the promotion of intercollegiate varsity competition. Some arguments are based on the value of the activity itself to those involved. Athletics on the competitive level, it is said, develop skills and self-discipline to the highest degree possible for those participating. Team sports encourage cooperation and develop friendships. For many, competitive sports are an enjoyable, even a thrilling, activity. Without further support, however, these arguments do not explain why universities ought to provide such intrinsically valuable activities. Skill development and teamwork surely can be learned outside the university; and there are many valued activities, from good parties to good horse racing, that universities are not generally expected to offer. More complete defenses of intercollegiate competition rely either on the benefits it provides to athletes—benefits which are thought in some way to be relevant to the educational function of the university—or on overall benefits to the university as an institution.

One quite traditional, and perhaps rather quaint, argument for intercollegiate competition is that it develops character traits in athletes—and, by example, in other students—in a way appropriate to the function of the university. The “Battle of Waterloo was won on the playing fields of Eton,” the Duke of Wellington once opined.<sup>2</sup> Some recent empirical work by sociologists, however, questions whether the kinds of character traits that are developed in intercollegiate competitive athletes today are appropriate sequelae of a liberal education. Chu (4) and Stevenson (28) report data suggesting that as athletes become more successful, they increasingly value winning rather than fair play, and that coaches tend to model authoritarian rather than autonomous behavior patterns. Both the focus on winning for its own sake, and the authoritarian coaching behavior might seem to be at odds with the values of a liberal education.

An argument that relies heavily on the social role of the modern university is that intercollegiate athletics are a source of upward mobility for otherwise disadvantaged participants. Varsity athletes receive scholarships and academic support that often are not generally available to other students. Premier athletes may parlay their college success into lucrative professional athletic careers. The experience of intercollegiate competition may also prove a useful basis for job opportunities more generally. Unfortunately, the data indicate that these claims are unjustifiably optimistic. Although varsity athletes do receive scholarships and other support, Purdy, Eitzen, and Hufnagel (23) report that graduation rates are low, particularly for minority students in the sports of football and basketball. Women athletes graduate in rates comparable to rates of students overall, but the picture is worsening for women playing basketball as their sport becomes increasingly successful and emulates the model of a male, revenue-earning sport. Dubois’s (6) study of post competition occupations of male varsity athletes in comparison to occupations of male students who did not participate in varsity sports shows no advantage for the athletes, whether white or minority. Intercollegiate sports have also been argued to be an important source of opportunities in professional sports. College football and basketball serve to some extent as a farm system for the professional leagues, although professional opportunities are limited. For women, there are few professional sports opportunities, and even fewer lucrative possibilities. If increasing numbers of women are well trained in college competition, however, perhaps they will become a source of pressures for changes in professional sports. Thus the desirability of pressures for increased professional athletic opportunities for women might be an argument for increased opportunities on the university level.

Another argument for varsity competition is the positive contribution it makes to attitudes towards athletes. Successful competition may be a source of self-esteem for the athletes themselves. Competition may also help change attitudes towards historically underappreciated groups. Both university and professional sports have been important forums for the admiration of minority male athletes. Female sports heroes such as Jackie Joyner Kersee have also emerged from the college ranks into professional and Olympic competition. They are exemplars of achievement and strength, rather than weakness and passivity. If intercollegiate competition contributes to changes in attitudes towards women and minorities, it is arguably linked to the social role of the university in opening opportunities for underrepresented groups in society and should be supported on that ground.

Intercollegiate athletics are also thought to be of significant instrumental benefit for universities. The "big game" is part of the mythology of campus life. Defenders of intercollegiate competition argue that winning sports teams garner respect for the institution, encourage better potential students to apply, and augment alumni donations. One recent survey of the data (30) suggests that this optimism is not borne out. Evidence for the contention that successful teams increase alumni gifts is very mixed. Contributions to booster clubs go to underwrite athletics rather than to bolster academic budgets. In a few cases, the investment in revenue-producing sports is profitable; in most schools, however, even high-profile sports are a losing proposition. In the end, claims that intercollegiate athletics contribute to an overall aura of institutional success are very difficult to pin down.

Finally, defenders of intercollegiate sports competition argue that it fosters university identification and community. Students, who may lead very fragmented and separate lives, come together to cheer on their teams. They are joined by alumni reliving their loyalties to alma mater. Members of the local community may also identify with university sports teams and town-gown conflicts may thus be mitigated (4). Sports are a "safe" vehicle for affiliation, cutting across at least some religious, cultural, racial, and generational lines, and even linking students with alumni and members of the local community. Chu (4: p. 162) has argued that students who attend university athletic events are more likely to be involved with the institution in other ways, although the study does not indicate whether these are dependent or independent variables. Even so, however, overall student community might be fostered more successfully by an intense intramural system such as the one in place at the University of California at Davis. When they attract visitors from afar, university athletic events surely bring money into local businesses; but there may be other, more successful ways for universities to contribute to local economies.

The case for intercollegiate competition on its current scale is thus tenuous. The best case that can be made for the current practice of intercollegiate sports is that they are sought after by their participants and may open opportunities for them, although the empirical evidence in support of this is slim. Varsity competition may also contribute to changed social perceptions of women and minorities, and to an enhanced sense of university community. Many continue to believe that, despite their flaws, university intercollegiate sports make important contributions to institutional glory and community, besides being just plain fun. At the same time, others charge that varsity competition exploits athletes, drains revenue, and detracts from the educational programs of the university. Efforts to remedy discrimination against women and minorities in university athletics thus take place against a background of at best mixed support for the enterprise generally.

## II. Title IX and University Athletics

Enacted in 1972, Title IX<sup>3</sup> prohibits discrimination in any educational program or activity receiving federal financial assistance. In part because of debates about Title IX's impact on athletics, universities were given six years from its adoption to develop compliance programs. Despite the phase in, Title IX was met with resistance from coaches of men's teams, from university athletics directors, and from the National Collegiate Athletic Association. For example,

the athletic director of the University of Maryland told a congressional subcommittee in 1975 that his department stood in staunch opposition to women's varsity sports because they did not want to market an inferior product (30). The NCAA lobbied Congress to exempt athletics from Title IX, and, when this effort failed, brought suit challenging the regulations issued by the Department of Health, Education, and Welfare (HEW) to implement Title IX.<sup>4</sup>

At the time Title IX was enacted, university athletic programs were heavily dominated by men's varsity sports. With the impetus of Title IX, many universities moved quickly to add a number of women's varsity teams. By the late 1970s, the typical pattern was for a university to offer roughly equal numbers of men's and women's teams in nonrevenue sports, men's and women's basketball teams, and a football team. Football of course consumed—and, in at least a few cases, produced—immense amounts of revenue. But differences persisted in the patterns of participation in, and support for, other men's and women's varsity teams. In 1985, the percentage of athletic budgets devoted to women's sports in Division I schools offering football was 12%; in nonfootball Division I schools, it was 23% (4: p. 103). Although expenses for women's sports rose after implementation of Title IX, Chu (4) reports that expenses for men's sports also rose by multiples of two to five times as much at different institutions during the same period. As late as 1993, NCAA (19) statistics indicate that only 34.8% of varsity university athletes were women, up from 31.3% in the 1984–85 academic year. In 1992, the NCAA (19) reported that only 30% of athletic scholarship money, 23% of operating dollars, and 17% of recruitment funds went to women. Nationally, the NCAA (19) calculated that the most frequently offered women's sport was basketball (289 schools; 3,873 athletes) and the sport with the most female participants was outdoor track (249 schools; 6,250 athletes). At individual institutions, participation rates over the entire period since the enactment of Title IX have departed noticeably from enrollment rates. At the University of Illinois in the Big Ten Conference, for example, although 56% of the student body was male, over 75% of the varsity athletes (including football players) were male.<sup>5</sup> Pieronek (20) reports that these rates were typical in the Big Ten Conference, which in 1992 proposed to require a proportion of at least 40% female athletes by 1997. At Colorado State University in the Western Athletic Conference, there was a better than 10% disparity in participation rates, a quite low difference by national and Big Ten standards, but insufficient for Title IX.<sup>6</sup> Moreover, with the merger of men's and women's programs at many institutions, Acosta and Carpenter (1) and Lapchick and Slaughter (12) have reported that the number of women coaches and women athletics administrators has dwindled.

By the early 1980s, over 100 Title IX challenges to gender differences in university athletics had been filed with the Office of Civil Rights of the Department of Education (32). In 1984, however, the United States Supreme Court held that Title IX applied only to specific program(s) receiving federal funding, rather than to entire institutions.<sup>7</sup> Because university athletics programs rarely received federal funding on their own, this holding largely deflated the Title IX challenges to them. In 1988, however, the program-specific interpretation of Title IX was superseded by Congress in the Civil Rights Restoration Act.<sup>8</sup>

Since 1988, a new set of Title IX complaints has been brought against university athletics programs, by both male and female athletes. These complaints have forced courts to rule directly on what is meant by nondiscrimination in

athletics programs under Title IX and, ultimately, to confront difficult ethical questions about the meaning of equal opportunity in university athletics.

The renewed ability to challenge athletics programs under Title IX coincided with a period of significant retrenchment in university athletics budgets specifically and university budgets more generally. Much of the Title IX litigation was instigated by athletes seeking to block their schools from dropping their chosen sports. Female members of varsity teams objected to cutbacks that eliminated the teams in equal numbers for both sexes. Male members protested cutbacks that were imposed unilaterally on men's teams. In several other cases, women members of club teams sought to compel their university to upgrade their teams to varsity status, a step that the university was unwilling to take for financial reasons.

Judicial analyses of these Title IX claims have followed a pattern set out in the federal regulations and interpretive policy manuals.<sup>9</sup> Athletics programs must not discriminate in awarding financial aid—although they may structure awards differently for separate male and female teams provided that reasonable and proportional aid is available for each.<sup>10</sup> Second, programs must provide equal opportunity in a range of important supportive services: equipment, practice times, travel and per diem allowances, coaching and tutoring, locker rooms, medical and training facilities, housing and dining services, and publicity. Finally, programs must offer a “selection of sports and levels of competition [that] effectively accommodate[s] the interests and abilities of members of both sexes.”<sup>11</sup> Relying on a policy interpretation issued by the Office of Civil Rights of the Department of Education,<sup>12</sup> courts have developed a three-prong test for effective accommodation of the interests of a sex that has been underserved historically in an athletic program: universities must offer varsity opportunities in proportion to representation in the student body; or, universities must demonstrate continuing progress in adding opportunities for the underserved sex; or, universities must demonstrate the interests and abilities of the underserved sex are in fact fully met.

This structure of analysis reflects an uneasy compromise between exactly equal levels of participation and the historical differences between men's and women's sports. First, it allows football to remain a sport apart, as long as there is equal opportunity in the program overall, by allowing separate teams in contact sports, along with separate scholarship and revenue functions for those teams. Second, this analysis also permits ongoing, quite large differences between percentages of participation by sex in varsity sports and percentages in the overall student body, that is, if the university can bear the burden of proving that existing interests and abilities are met for the underrepresented sex. This allowance, too, is important to the perpetuation of large football programs.

On the other hand, where there are ongoing disproportionalities between participation rates and the student body, the university will be virtually compelled to accede to demands by women for a sport to be upgraded, or for a sport to be protected from cuts. In the view of the Department of Education (32),

Institutions where women are currently underrepresented in the athletics program will have a difficult time maintaining compliance with Title IX while eliminating women's teams unless they make comparable cuts, and, in some cases, deeper cuts in the men's program. . . . Institutions that plan to eliminate the same number of

sports for men and women may also have compliance problems if women are already underrepresented in the athletics program.

Women ice hockey players, for example, obtained a court order in line with this analysis, compelling Colgate University to upgrade their club team to varsity status, against a background of differential participation in varsity sports by women and men.<sup>13</sup> Women gymnasts and field hockey players at Indiana University of Pennsylvania successfully fought elimination of their varsity teams (in tandem with the elimination of men's tennis and soccer), despite a university proposal to replace them with women's soccer.<sup>14</sup> At Colorado State University, women blocked the elimination of fast-pitch softball;<sup>15</sup> at Brown University, they fought off cuts in women's gymnastics and volleyball.<sup>16</sup> On the other side, male athletes have not found Title IX a particular ally in their efforts to stall cuts, even when the counterpart women's team was spared. Male swimmers at the University of Illinois, for example, failed in a challenge to their team's elimination despite the continuation of the women's team, because the Illinois athletics programs were predominately (75%) male.<sup>17</sup>

Thus as Title IX is currently implemented, unless a university provides varsity opportunities in proportion to enrollments (which schools fielding football teams are unlikely to do), women's varsity sports are virtually guaranteed protection when women express interest in varsity competition. This bottom line has been characterized by Thro and Snow (31) as a form of affirmative action and criticized as an unfair burden on straitened athletics budgets. A quick but facile reply to this criticism is that universities can do much to end participation rates that are disproportional to enrollments by cutting football rosters.<sup>18</sup> A deeper set of concerns is prompted by the observation that mandated varsity teams may be quite expensive yet benefit only the few athletes who participate in them. Pieronek (20) estimates that in order to achieve proportionality with enrollments but still leave men's varsity sports untouched, universities would need to add on average six sports (and 128 varsity spaces) for women. Is Title IX, as currently interpreted to barter football for women's varsity teams, a desirable model for equality in athletics? Is it an example of affirmative action at all, much less of justifiable affirmative action? Should universities cut football, cut other men's sports, or add women's sports? Should revenues from football, when football is profit-making, be dedicated to football or be used to underwrite the remainder of the academic program?<sup>19</sup> Would models of equality that require major changes in the organization of intercollegiate athletics be morally preferable within the current context?

### III. Affirmative Action in University Athletics

The term *affirmative action* encompasses a wide range of positive steps that might be taken in response to discrimination.<sup>20</sup> In university athletics, in addition to the provision of varsity sports opportunities for women, affirmative action might include efforts to evoke women's interest and develop their skills, to encourage intramural participation by more women, to form coeducational teams, and even to reassess the entire way that intercollegiate competition is structured and understood. In comparison, affirmative action in employment has

ranged from reassessment of frankly biased selection criteria, to job training and recruitment, to redefinition of entire job categories.

I have argued elsewhere (10) that the case for affirmative action in education can be made on at least three different moral grounds. Affirmative action may be used to compensate identified victims of past injustices; the creation of remedial programs for individuals who have been unjustly denied opportunities is an example. In athletics, Lapchick and Slaughter (12) suggest the example of providing enhanced scholarship opportunities for women who have been discriminatorily denied them. It may serve to correct ongoing discrimination; faculty recruitment or hiring goals may be required when patterns of selection indicate subjective, difficult-to-eradicate bias. An example here might be the recruitment of more women coaches and athletic administrators. A third moral justification for affirmative action is that it may be a method for improving overall distributive justice in society. The United States Supreme Court had held, however, that a concern for social justice is not a legally compelling interest that can justify the state's use of reverse racial preferences in such areas as government contracts.<sup>21</sup> Nonetheless, educational diversity may remain a legally compelling state interest that justifies university consideration of multiple factors, including race, in making admissions decisions.<sup>22</sup> An example from athletics might be increasing participation by women to further the likely development of women's opportunities in professional sports.

These arguments for affirmative action typically are made within contexts in which the activity at issue is thought to be worthwhile both to the individuals seeking increased access and to society more generally. Compensatory affirmative action gives victims something of value, such as a training opportunity. Moral objections to compensatory affirmative action generally rest on the claims of others to the means of compensation, such as admission to a training program, or on whether the source from which compensation is sought is any way responsible for the past victimization, not on whether the means of compensation is itself a good. Corrective affirmative action roots out continuing bias in order, it is hoped, that everyone is treated fairly. Here, the chief moral objection lies not with what is being distributed, but with the risk that affirmative action will introduce new forms of bias. Redistributive affirmative action aims to move society towards more just distribution of the benefits and burdens of social living. Here, too, objections that affirmative action is unjust rest on who wins and loses under the change and why and how they lose, rather than on whether it is a good thing for anyone at all to experience the benefits being redistributed.<sup>23</sup>

What happens to these justifications for affirmative action if an historically disadvantaged group seeks fuller participation in an activity that is socially problematic or that should be reduced or eliminated for good social reasons? If criticisms of the current practice of university athletics are to be believed, this is the problem posed by affirmative action for women in intercollegiate varsity competition. I will argue here that the case for affirmative action is limited, but not entirely vitiated, under such circumstances. Moreover, how the case is changed depends on the nature of the reasons for discouraging the activity; several importantly different reasons are that it is risky to participating individuals, that it is costly but unlikely to yield any benefits to participants, or that it has undesirable consequences for others in society.



First, take activities that are risky to participants. Such risks have been offered as objections to including women in high-injury or high-stress sports.<sup>24</sup> They may be at least part of the explanation for the continued accommodation of separate teams for men and women in contact sports.<sup>25</sup> Risks to participants are, however, unjust reasons for exclusion, so long as the activity is left open to men. Medical experiments with human subjects are an illuminating analogy.<sup>26</sup> Some experiments simply are not permitted by federal regulations because their risks outweigh their potential benefits. Researchers may not enter any subjects in such experiments, even with the subjects' informed consent. In medical research, however, there has been a long-standing practice of routinely excluding women from experiments, allegedly because of the risks of pregnancy or the need for a uniform subject population. This exclusion has been criticized as unwarranted paternalism, because it substitutes the experimenter's risk judgments for the judgments of the excluded group of women subjects, but not for the included men subjects. It thus continues stereotypes of women as less capable of responsible decision-making. Moreover, as Merton (15) and others have argued, the insistence on exclusion to ensure a uniform patient population is misguided because it significantly limits the information that is available about the responses of women to new medical therapies and limits women's access to the therapies themselves in their developmental stages. The National Institutes of Health (NIH) have recently issued policy guidelines requiring equal participation of women in studies it sponsors and analysis of relevant differences in results by gender, unless there is a compelling justification to the contrary. Thus, in medical research, affirmative action has not been required when experiments are prohibited across the board, but is demanded when a study is open to men but not to women. Applying this analogy to sports, the conclusion would be that universities may decide that some sports are too risky to offer at all, but not that their risks warrant limiting them to men.

A second concern about the assumption that it is desirable to increase opportunities for varsity competition is that there is little evidence that such competition benefits participants with increased educational or job opportunities. This lack of evidence at least undercuts the argument that affirmative action in women's varsity athletics will give more women these benefits and thus increase overall social justice. The fact remains, however, that Title IX only requires a university to protect women's varsity sports when its athletic program is disproportionate, when it has not made continued progress towards improvement, or when there is unmet need among able women competitors. A university can avoid a Title IX order if it can show that there is insufficient interest or ability to field a given women's team. Nonetheless, a university with a problematic history will need to respond to expressions of women's interest despite a lack of evidence that the women will ultimately benefit. Such universities will be ordered to make quite substantial expenditures because a few women want the opportunities. In times of tight budgets, there is something unfortunate about costly expenditures that respond to the desires of a few. This argument could be the basis for the elimination of all varsity sports that respond principally to the interests of their participants—all of what might be called "vanity" sports. The trouble with applying this argument to the present situation, however, is that universities continue to offer at least some low-interest varsity sports for both men and women. As long as universities continue the pattern of funding for

“vanity” sports, it is wrong for them to offer this desired benefit disproportionately to men. Title IX’s requirements are therefore justified. At the same time, it might be preferable from the point of view of justice to eliminate all “vanity” programs and spend the money saved on more important opportunities for a larger group of students such as intramural sports, an issue to which I shall return in the final section.

Universities opting to eliminate all intercollegiate competition in “vanity” sports, however, would also confront the problem of whether they could choose, legally or ethically, to retain football as a revenue-producing sport.<sup>28</sup> Under current legal standards, they probably could not make this choice; although Title IX permits differently structured and financed programs, it also requires that there be equal accommodation of the interests of women athletes, including provision of teams at competitive levels and efforts to develop women’s teams as revenue-producers on the model of men’s teams. It would also be ethically troublesome to retain football while abolishing the remainder of the intercollegiate program for both men and women. This choice would leave the university with a high-profile, highly sought after (albeit most likely not beneficial) showcase for male athletes, with no comparable opportunities for women. An alternative might be to take up the suggestion of critics of university athletics that some allegedly profitable sports enterprises be privatized.

Finally, what are the consequences for affirmative action if the activity to which increased entry is sought is one that there are good social reasons for discouraging entirely? As the initial section of this paper argued, intercollegiate athletic competition might well fall into this category because it is expensive, provides little or no educational benefit, and may foster problematic images of excellence and fair play. If society is genuinely discouraging the activity, then the argument for affirmative action would be undercut. But if society is not working to discourage the activity, the case for affirmative action remains. It is worse from the point of view of justice to continue sponsoring the activity, but leave women out, than to sponsor it without women. It is worse still if one of the concerns about the activity is that it contributes to problematic images of women or other disadvantaged groups. Thus even if it would be best overall to phase out intercollegiate athletic competition, it is better to make serious efforts to include women, even if they increase the resources committed to the enterprise, than to continue it with disproportionate participation by men. In short, universities that stick with football are stuck with Title IX.

There are, to be sure, moral difficulties with phasing out intercollegiate competition, just as there are with phasing out any cherished benefit. Athletes, both male and female, have been recruited with promises of scholarships and competition. They have what I have argued elsewhere (9) might be viewed as legitimate expectations that these opportunities will continue during their time as students; at least, they have been encouraged to form these expectations by those providing the benefits—they have had no reason to believe the assurances were dubious or that they themselves were benefiting as perpetrators of injustice. These expectations might be the basis for constructing a phase-out so as to cushion the impact on present athletes, while not creating a new set of expectations for incoming students. Recruited athletes might, for example, be able to keep their scholarships for four years; or, universities might continue to field competi-

tive teams at least through the junior years of recruited athletes in sports slated for discontinuation.

Phase-outs such as the abolition of all or most “vanity” sports face tremendously difficult issues of coordination, however. Unless all of the schools within a conference—or, perhaps, within a region—adopt similar phase-out strategies, athletes recruited by one school will find themselves left out, while athletes at other schools will continue to compete. They may well believe that they have been treated unfairly by their own schools. While they have no entitlement to continue to compete, and of course are free to transfer, it is true that they are losing a cherished benefit that others just like them continue to enjoy. The situation is perhaps worst when a men’s sport is cancelled and women at the same school continue to enjoy the opportunity to compete in that sport.<sup>29</sup> The alternative that avoids the apparent unfairness of differential treatment of athletes with similar expectations is to continue to provide the competitive opportunity until a coordinated system of cuts is in place. Athletes already recruited could continue to enjoy their sport until it was gradually phased down in a coordinated way, and new recruitment efforts would cease. Such coordination strategies are difficult to implement, however, because as Fleisher, Goff, and Tollison (8) argue, individual athletic departments have incentives to keep their budgets as large as possible. Thus the fairest of the likely outcomes is to continue to support men’s “vanity” sports, while increasing support for women’s sports—an outcome that is expensive and that may lead universities in the long run to reconsider the wisdom of their support for intercollegiate competition.

#### IV. Beyond the Title IX Model of Equality

The strong protection given women’s varsity sports by Title IX is thus justified despite—and perhaps even because of—the flaws of the current system of competition. A better alternative, however, might be to consider ways of radically restructuring intercollegiate athletic competition. In this concluding section, I explore four possibilities for reconstruction and argue that all are preferable, from the point of view of justice, to affirmative action within the current context.<sup>30</sup> None, however, are explicitly supported by the current interpretation of Title IX.

First, universities might increase efforts to encourage women to participate in skills training and sports activities. If women’s historical underrepresentation in competitive athletics is in part a result of earlier educational programs and attitudes that discourage them from participating in athletics at all, such efforts are an important form of affirmative action. Because the aim would be to increase exposure to a real benefit, the focus of such encouragement would be fitness and skills activities that are of lifelong importance and simply not short-term competitive opportunities. An analogy might be the programs at many universities to increase interest and training in science and mathematics among women and minority students. The focus of the Title IX regulations, however, is the provision of levels of competition that “effectively accommodate the interests and abilities of members of both sexes.”<sup>31</sup>

A second initiative for universities might be the development of intramural sports programs that expand participation and competition widely throughout the student body. A typical pattern at universities today is the contrast between lavish support for varsity athletics and little support for intramural activities.

An alternative would be to improve intramural facilities, to make educational opportunities (such as skills training) available in conjunction with them, and to increase the amenities associated with them. The University of California at Davis is an example of how widespread intramural programs can help to develop a sense of community among students. While Title IX requires the provision of appropriate levels of competition at all levels, including the intramural level, its emphasis, as it has been interpreted in litigation, has been varsity teams, not the overall expansion of athletic participation across the student body.

A more radical option might be the reconsideration of what are considered sports. Sports today emphasize physical characteristics such as bulk (football) and height (basketball)—characteristics that are predominately male—rather than characteristics such as finesse, agility, or endurance. Women athletes confront what Martha Minow (16) has called the “difference dilemma”: either they play by historical rules, which fail to acknowledge differences between women and men, or they are stigmatized for calling attention to differences. Women basketball players, for example, have moved into a sport constructed for tall bodies. Although they have in many respects been successful in constructing a different kind of sport—one that emphasizes ball movement, for example—they might have constructed an even more exciting sport had basket height or angle been adjusted. Nonetheless, there have been some encouraging signs in the direction of changed sports emphases. For example, women's soccer has become far more popular, as have endurance track events such as the marathon for women. Gymnastics tests different skills for men and women; women's gymnastics has become a popular sport on some campuses, although sometimes one that advertises based on the sexuality of the women athletes involved. Title IX, as it has been interpreted, however, does not require implementation of new sports for women, except in response to demand; it may even be an obstacle to new sports to the extent that it protects established ones.<sup>32</sup> Moreover, there is no mandate in Title IX for the identification or development of entirely new sports.

Finally, university sports programs might consider the introduction of coeducational teams. Such teams are of course a mainstay of recreational and intramural programs. They emphasize teamwork and complementary skills—both characteristics that are arguably beneficial and useful educationally. Such teamwork opportunities might also be highly useful in acculturating women and men to work together in other contexts, especially if the opportunities are spread widely throughout the student body. Yet no intercollegiate competition today features coeducational teams, although parallel teams are fielded in such sports as tennis, swimming, diving, track, golf, and skiing. Even mixed doubles, a staple of both professional and recreational tennis, is ignored on the college level. Title IX accepts the separation of men's and women's teams outright, with one exception: in noncontact sports in which no team is fielded for the underrepresented sex, members of the excluded sex must be permitted to try out on a skills basis for the team of the other sex.<sup>33</sup>

## V. Conclusion

In this article, I have argued that university athletics for women should be treated as a case of affirmative action within a morally flawed practice. So long as the practice continues in its present form, the case for affirmative action

remains. But there is a stronger case to be made for radical changes in the current practice. Title IX, the statute requiring equality in federally funded educational programs, does not propose such radical changes and may even in some contexts be a roadblock to them.<sup>34</sup>

## Notes

<sup>1</sup>As such, my criticism is directed principally at NCAA Division I and Division II schools, which mount large-scale competitive programs. It may not apply to Division III schools, which do not offer athletic scholarships per se, and which adhere to much more stringent limits on funding and other participation in intercollegiate athletics. However, to the extent that Division I practices operate covertly in Division III schools (for example, by using school tours to recruit athletes and suggest the possibility of athletic scholarships), the analysis applies to them also.

<sup>2</sup>Quoted in Chu, Segrave, and Becker (5: p. 215); Martin (14) also examines the argument that sports build character.

<sup>3</sup>20 U.S.C. § 1681(a) (1993).

<sup>4</sup>*NCAA v. Califano*, 622 F.2d 1382 (10th Cir., 1980).

<sup>5</sup>*Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993).

<sup>6</sup>*Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993); *Roberts v. Colorado State University*, 814 F. Supp. 1507 (D. Colo.), *aff'd* sub nom. *Roberts v. Colorado State Bd. of Agric.*, 993 F.2d 824 (10th Cir.), cert. denied, 114 S.Ct. 580 (1993).

<sup>7</sup>*Grove City College v. Bell*, 465 U.S. 555 (1984).

<sup>8</sup>20 U.S.C. § 1687 (1993); P.L. No. 100-259, 102 Stat. 28 (1988).

<sup>9</sup>Policy Interpretation, 44 Fed. Reg. 71413 (December 11, 1979; United States Department of Education, 33).

<sup>10</sup>34 C.F.R. § 106.37(c) (1993).

<sup>11</sup>34 C.F.R. § 106.41(c) (1993).

<sup>12</sup>44 Fed. Reg. 71413 (December 11, 1979).

<sup>13</sup>*Cook v. Colgate University*, 802 F. Supp. 737 (N.D.N.Y. 1992), vacated and remanded on other grounds, 992 F.2d 17 (2d Cir. 1993). (The other grounds were graduation of the athletes involved in the suit.)

<sup>14</sup>*Favia v. Indiana University of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (3d Cir. 1993). Although the undergraduate population at IUP was 55.6% women, only 38% of the varsity athletic slots and 21% of the athletic scholarships went to women. The court suggested in dicta that Title IX probably not only forbade the cancellation of women's varsity sports when interested athletes were available but also mandated the addition of further women's varsity sports.

<sup>15</sup>*Roberts v. Colorado State University*, 814 F. Supp. 1507 (D. Colo.), *aff'd* sub nom. *Roberts v. Colorado State Bd. of Agric.*, 993 F.2d 824 (10th Cir.), cert. denied, 114 S.Ct. 580 (1993).

<sup>16</sup>*Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

<sup>17</sup>*Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993).

<sup>18</sup>The NCAA allowed 88 football scholarships in 1993; at many universities, this is equivalent to the total number of scholarships awarded members of women's teams. When nonscholarship players are allowed to join football teams, squad size may balloon

to 145. In comparison, National Football League teams are allowed only 45 players. See Pieronek (20).

<sup>19</sup>*Blair v. Washington State University*, 740 P.2d 1379 (Wash. 1987) held that the state's equal protection clause and nondiscrimination statute did not require football revenues to be shared within the athletic program; this approach is endorsed by Pieronek (20).

<sup>20</sup>The term comes from the remedy section of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5 (1993).

<sup>21</sup>*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>22</sup>*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>23</sup>Where there are no common paradigms of social benefits and burdens, it may be impossible to find agreement on basic principles of justice, much less on when redistribution is justified under conditions of injustice. The theoretical shifts from Rawls (24) to Rawls (25) are instructive on this point.

<sup>24</sup>An example is the rejection, until quite recently, of the women's marathon in Olympic competition.

<sup>25</sup>Or are concerns about sexual contact the real explanation?

<sup>26</sup>Another analogy might be inclusion of women in combat positions in the military.

<sup>27</sup>"NIH Guidelines on the Inclusion of Women and Minorities as Subjects in Clinical Research," 59 Fed. Reg. 14508 (March 28, 1994).

<sup>28</sup>Basketball isn't really an issue here, since women's basketball is so well established and a university could achieve equality by retaining both women's and men's basketball.

<sup>29</sup>Cases that are examples are *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993), and *Gonyo v. Drake University*, 837 F. Supp. 989 (S.D. Iowa 1993).

<sup>30</sup>These possibilities are suggested in English (7), Moulton (18), and Postow (21, 22). They have been criticized by Belliotti (3) and Simon (26).

<sup>31</sup>34 C.F.R. § 106.41(c) (1) (1993).

<sup>32</sup>In *Roberts v. Colorado State University*, 814 F. Supp. 1507 (D. Colo.), *aff'd* sub nom. *Roberts v. Colorado State Bd. of Agric.*, 993 F.2d 824 (10th Cir.), cert. denied, 114 S.Ct. 580 (1993), for example, the university sought to substitute women's soccer—a sport that included more athletes and afforded more competitive opportunities—for women's fast-pitch softball. The court refused to allow the substitution and suggested in dicta that CSU might be required to provide both sports for women. If budgets are tight, however, the result might be continued protection of the fast-pitch team, with little development of soccer. For criticism of this outcome, see Chu (4).

<sup>33</sup>34 C.F.R. § 106.41(b) (1993).

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